IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 715

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Middle District of Florida

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APPELLANT'S REPLY TO MOTIONS TO AFFIRM

The appellees have moved this Court to affirm summarily the judgment below. Appellees have not, however, suggested any meaningful solution to, nor even met head on, the problems raised by the faulty administrative procedure followed here by the Commission and approved by the court below.

I

Appellees ask this Court to approve an order of the Commission that requires East Coast to permit Sea-

board the use of East Coast tracks that are to be reached via a connecting track, which does not exist and which Seaboard has not requested nor received authority from the Commission to construct.[1] Seaboard suggests that the absence of the "essential" connecting track is of no consequence because

> (1) Seaboard could perform service to Dodge Island via an existing interchange track (Seaboard Motion, pp. 8-9);
>
> (2) the proposed connecting track could be constructed without Commission approval under the exemption in section 1(22) of the Act, 49 U.S.C. § 1(22) (Seaboard Motion, p. 12).[2]

With respect to (1) above, Seaboard has not proposed and the Commission has not approved use of East Coast interchange tracks. With respect to (2) above, Seaboard has failed to apprise the Commission or this Court of the legal and practical problems occasioned by East Coast's ownership of a portion of the land to be traversed by the proposed connection (Tr. 144) and the further adjudication under section 1(20) of the

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[1] The Commission noted in its report that "no application is pending for consideration of other essential track construction projects, nor is our approval of the application here to be construed as authorizing such construction" (327 I.C.C. at 7; JS, Appendix B, p. 15a).

[2] Seaboard, the only appellee taking this position, devotes five pages of its motion to arguing that the proposed construction falls within the section 1(22) exemption (Seaboard Motion, pp. 8-12). That question has not been presented to this Court for resolution. The Commission and the United States acknowledge that they are uncertain whether the section 1(22) exemption is applicable to this construction (Government Motion, p. 4 fn.).

Act that would be occasioned by Seaboard's commencement of construction without appropriate authority.[3]

Seaboard's insistence that it will commence construction without a certificate under section 1(18) only adds to the contingencies outlined at pages 13 and 14 of appellant's jurisdictional statement. The Commission's order could now be implemented only upon the concurrence of those contingent events together with Seaboard's prevailing in a suit under section 1(20). An administrative order whose finality is dependent upon the concurrence of so many contingencies is not ripe for judicial review. *Eccles* v. *Peoples Bank,* 333 U.S. 426, 432 (1948).

II

The Commission and the United States in their motion do not discuss the unresolved practical and legal questions that make a nullity of the apparent determination of legal rights in the challenged order.[4] Instead,

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[3] Section 1(20), 49 U.S.C. § 1(20), provides in pertinent part:

"Any construction . . . contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest" (JS, App. D, p. 42a).

[4] The Government merely asserts that the order is final because it purports to fix a legal relationship and the fact that other rights and obligations are left to future determination does not deprive the order of finality. The two cases relied on by the Government do not support the Government's position here and are of no help to this Court in reviewing the Commission's fragmented procedural approach to this case. In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) (Government Motion, p. 4), a majority of this Court held that orders of the Civil Aeronautics Board, which are subject to approval by

the Government joins Seaboard in arguing that the issue of reviewability raised by appellant is invalid because it is an issue more often raised by an appellee (Government Motion, pp. 4-5; Seaboard Motion, p. 4). The Commission and the United States imply that East Coast did not question the Commission's improper procedure prior to judicial review (Government Motion, p. 4). Such an implication is absolutely false. East Coast first challenged the propriety of the Commission deciding the section 3(5) application in the absence of an application for appropriate authority under section 1(18) to construct the essential connection in its exceptions to the report and recommended order of the Commission's hearing examiner. Seaboard, in its reply to exceptions, responded to East Coast's argument on this issue. The Commission's failure to correct its improper procedure at that point left East Coast with no recourse but to protect its rights through judicial review. East Coast has accordingly raised the issue in this Court, as well as in the court below.

The interdependence of the section 1(18)-(22) issues not decided by the Commission[5] and the section 3(5) issue, which the challenged order purports to decide, is inescapable. The issues are not only procedurally in-

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the President, are not subject to judicial review. In *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957) (Government Motion, p. 4), a majority of this Court held that the Commission was empowered to issue an unrestricted certificate under section 207 of the Interstate Commeree Act, 49 U.S.C. § 207, and that the evidence was sufficient to support the Commission's findings.

[5] As pointed out in footnote 2, *supra*, the Commission acknowledges that there is a question whether the construction is subject to section 1(18) or the exemption of section 1(22).

separable, but they must also both be resolved under the more stringent "public convenience and necessity" standard applicable to section 1(18) cases (See JS, p. 6, fns. 1 and 2). The Commission has, in fact, just avoided the same procedural error in another proceeding. In an order served November 1, 1966, in Finance Docket No. 23732,[6] the Commission consolidated interrelated proposals of rail operation under section 1(18) and 3(5), reasoning as follows:

> *It further appearing,* That the proceedings are in terrelated with the said disputed facts relevant to each, and that assignment of the petitions and applications for separate hearing, or dismissal of the section 3(5) application for lack of jurisdiction, or deferred consideration of Eagle's section 1(18) application, would not be conducive to an orderly disposition of the proceedings because of their interrelation and the probable section 3(5) jurisdiction if Eagle's section 1(18) application is granted. (Appendix, *infra,* p. 11)

The Commission could and should have taken similar action in this proceeding.

The Commission's failure to adopt an orderly and rational procedure has resulted in this appeal. The Government alleges—without support—that appellant

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[6] *Southern Pac. Co. Abandonment (Portion) Westwood Branch in Lassen County, California.* The cited order also includes the following directly related proceedings: Finance Docket No. 23910, *Western Pac. R.R.—Purchase (Portion)—Southern Pac. Co.;* Finance Docket No. 24136, *Eagle Lake Lumber Co.—Use of Terminal Facilities of Southern Pac. Co.;* Finance Docket No. 24254, *Eagle Lake Lumber Co.—Acquisition and Operation—Southern Pac. Co.* The Commission's order is reproduced as an appendix to this reply.

has raised the reviewability issue "solely for purposes of delay" (Government Motion, p. 5). Yet, what could be more encouraging of delay and a multiplicity of separate judicial and administrative determinations than the procedure supported by appellees? If appellees prevail, the construction issue will first be determined in a judicial suit under section 1(20) followed by appellate review. If East Coast prevails in that action, the Commission must then decide an application by Seaboard under section 1(18), subject to a separate judicial review by a three-judge district court and another appeal to this Court. These subsequent proceedings and the inconclusive appeal now being presented to this Court would not be necessary had the Commission resolved the section 1(18) issue concurrently with the directly related application under section 3(5).

Appellant has urged repeatedly, to the Commission and the court below, the necessity for simplified treatment of all relevant issues in a consolidated proceeding. The same purpose underlies appellant's present suggestion that this Court vacate the judgment of the District Court and remand the case to that court with directions to review the challenged order when and if it becomes final as a result of further adjudicative determinations. If the contingencies necessary to implementation of the Commission's order occur, judicial review at that time will result in a final determination of all issues relevant to Seaboard's overall proposal for rail operation. If, on the other hand, Seaboard is denied access to the involved tracks as a result of further adjudication, this case can at that time be dismissed as moot. The relief requested by East Coast is precisely that suggested to this Court by the Government in *Baltimore and Ohio Railroad Company, et al.* v.

United States, No. 642, October Term, 1966[7] (Memorandum for the United States, p. 32).

CONCLUSION

Any action taken at this stage of the proceeding will, of course, be less effective than what the Commission could have accomplished by adopting a proper procedure here in the first instance. This fact should not, however, detract from the advantages inherent in appellant's suggestion to this Court. The action recommended assures that the reviewing court below will have before it for decision in a single proceeding all relevant and decisive issues raised by Seaboard's total proposal of rail service to Dodge Island.

Respectfully submitted,

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[7] This is the lead docket of three appeals challenging the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company.